

ADMINISTRATIVE RECORD

The Board's "Findings and Decision"

On October 18, 2012 the Board issued its "Findings and Decision" (Decision), and ordered Tan discharged from his position as a police officer, with one Board member dissenting as to the penalty. The discharge proceedings began on June 20, 2012 when the Superintendent of Chicago Police filed charges against Tan for violating three "Rules of Conduct:" Rule 1, violation of any law or ordinance; Rule 2, any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department; and Rule 14, making a false report, written or oral. Board Hearing Officer Thomas E. Johnson conducted a video-recorded hearing on September 5 and 6, 2012. The following witnesses testified: Micro Center employees Henry Nichols (Nichols) and Jomari Carrion (Carrion), Chicago Police Sergeants Frederick Harnisch and Michael Barz, Tan's brother Jay, and Tan. After the hearing, the Board members read and reviewed the record of proceedings, viewed the video-recording of the testimony of the witnesses, heard Hearing Officer Johnson's oral report, and conferred with Hearing Officer Johnson on the credibility of the witnesses and the evidence. (Decision, pp. 1, 6).

The Board members found Tan guilty of violating Rules 1, 2, and 14. Specifically, "[o]n or about January 19, 2011, at approximately 1814 hours, [Tan] knowingly committed the act of retail theft at Micro Center computer store, located at 2645 North Elston Avenue, Chicago, by removing price tags from lower-priced merchandise and affixing them on higher-priced merchandise and subsequently purchasing the

merchandise, in violation of 720 ILCS 5/16-25(a)(2)." (Decision, p. 2). In addition, "[o]n or about January 26, 2011, after being told that it was an official Chicago Police Department report and that any deviation from the truth could result in charges being filed against him, [Tan] gave a formal statement wherein he falsely stated that he did not place an \$8.99 price tag on a Verbatim BluRay Disc Three Pack over the \$39.99 price tag of the item." (Decision, p. 5). Further, "[o]n or about January 26, 2011, after being told that it was an official Chicago Police Department report and that any deviation from the truth could result in charges being filed against him, [Tan] gave a formal statement wherein he falsely stated that he did not place a \$14.99 price tag on the D-Link Xtreme Desktop Express Adapter." (*Id.*).

The Board's Credibility Findings

The Board made the following credibility findings regarding Nichols, the Micro Center loss prevention manager, whose testimony the Board characterized as "disinterested:"

"credits" the testimony of Nichols: he personally observed Tan remove the SKU stickers from two adapter items, one pictured in City's Exhibit 3¹ and one pictured in City's Exhibit 4, and switch them, so the price charged for the adapter item pictured in City's Exhibit 3 was reduced from \$69.99 to \$14.99;

"believes" the testimony of Nichols: he personally observed Tan remove a \$8.99 SKU sticker from a box of blu-ray discs and place it over a more expensive box of blu-

¹ Although the Decision refers to "Superintendent Exhibits," those exhibits are marked "City's," referred to as such in the briefs, and will be referred to as such in this ruling.

ray discs, pictured in City's Exhibit 6, so that City's Exhibit 6 could be purchased for \$8.99 instead of \$39.99;

"truthful in testifying:" that Tan apologized to Nichols once Tan was in the store security office and offered Nichols a ride in a police helicopter if Nichols would excuse the incident, as Nichols "would not have any knowledge that Officer Tan was a police helicopter pilot unless Officer Tan made this offer" to Nichols himself.²

The Board made the following credibility findings regarding Carrion, a store sales clerk, whose testimony the Board characterized as "disinterested:"

"convincingly testified:" she personally observed Tan with a SKU sticker in the palm of his hand.

The Board made the following finding of corroboration regarding Carrion:

Nichols's testimony is "further supported" by Carrion's testimony that she personally observed Tan with a SKU sticker in the palm of his hand.

In addition, the Board "specifically believes the testimony of Mr. Nichols and Ms. Carrion that Officer Tan switched the stickers on City's Exhibit Nos. 3 and 6." (Decision, p. 5).

The Board made the following credibility findings regarding Tan:

His "self-serving denial of any theft is undermined by the apology he made to Mr. Nichols and the disinterested testimony of Mr. Nichols and Ms. Carrion." (Decision, p.3). His statements to the Department were false. (Decision, p.5).

² Although the decision and the parties refer to a ride in a police helicopter, the transcript reflects that Nichols testified that Tan "offered to give me a ride in a helicopter." 9/5/12 transcript at 53. Tan was questioned with reference to "your helicopter." *Id.* at 222. Followed by the ambiguous question, "Do you remember if you offered to give [Nichols] a ride?" *Id.* at 223.

The Board made no credibility findings as to the other witnesses.

The Board's Evidentiary Ruling

The Board recognized that the "Department erred in destroying the actual items stolen by Officer Tan." (Decision, p. 3). However, the Board concluded "there are photographs of these items, and in a retail-theft case photographs are sufficient evidence of the items stolen under 725 ILCS 5/115-9(a)." (*Id.*). The Board distinguished *People v. Mikolajewski*, 272 Ill.App.3d 311 (1st Dist. 1995), a felony case in which the court remanded with instructions to convict the defendant of misdemeanor theft because the photographs failed to show the price of the merchandise to support the felony conviction. The Board declined to draw an adverse inference from the Department's destruction of the property, finding that Tan demonstrated no prejudice as a result of not having the actual merchandise at the hearing.

The Board's Determination of the Penalty

The Board considered "evidence presented in defense and mitigation," including Tan's complimentary history, consisting of 10 items, and his lack of any disciplinary history. (Decision, p. 5). The Board determined Tan must be discharged due to the serious nature of the conduct of which the Board found him guilty, that is, knowingly committing retail theft and then making "false official statements in an effort to cover up his illegal actions." (Decision, pp. 5-6). Further, the Board explained that Tan "exhibited a significant lack of integrity, honesty, and trustworthiness, and his conduct is incompatible with continued service as a police officer." (Decision, p. 6). The Board found Tan's conduct "is sufficiently serious to constitute a substantial shortcoming that

renders his continuance in his office detrimental to the discipline and efficiency of the service of the Chicago Police Department, and is something which the law recognizes as good cause for him to no longer occupy his office.” (*Id.*). Board member Ballate concurred with the findings of guilt, but found a suspension to be a more appropriate penalty based on Tan’s “complimentary record and the lack of any prior disciplinary record.” (Decision, p. 8).

STANDARD OF REVIEW

Judicial review of an administrative decision to discharge an employee requires the court to determine first, whether the agency’s findings of guilt are against the manifest weight of the evidence, and second, whether the findings of fact sufficiently support the agency’s conclusion that cause for discharge exists. *Walsh v. Board of Fire and Police Commissioners of the Village of Orland Park*, 96 Ill. 2d 101, 105 (1983). The manifest weight of the evidence is an exacting standard. *Raitzik v. Board of Education of the City of Chicago*, 356 Ill. App. 3d 813, 824 (1st Dist. 2005). The court’s role is circumscribed: the court may not reweigh the evidence, make independent determinations of fact, substitute its judgment for that of the agency, or reverse because the opposite conclusion is reasonable. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). The Administrative Review Law mandates that the “findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.” 735 ILCS 5/3-110. Also, the caselaw makes clear that “[i]t is particularly within the province of the administrative agency to resolve any conflict presented by the evidence and to determine the credibility of the witnesses.” *Peterson v.*

Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines, 54 Ill. 2d 260, 263 (1973) (citation omitted). An administrative agency's factual determinations are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008).

ANALYSIS

To succeed on administrative review Tan must show that the Board's finding that he is guilty of violating Rule 1 by committing retail theft is against the manifest weight of the evidence. If the Rule 1 violation is against the manifest weight of the evidence, then the violations of Rules 2 and 14 necessarily fall. If Tan's challenge to the violations fails, to succeed on administrative review of the penalty, Tan must show that the Board's decision to discharge him for cause was arbitrary, unreasonable, or unrelated to the needs of the service.

Tan's Arguments

Tan argues that the Board's decision is against the manifest weight of the evidence. He first contends that the credibility findings regarding Nichols and Carrion are inconsistent. Specifically, he asserts that it is impossible to believe the testimony of both Nichols and Carrion, as the Board did, because believing Carrion's testimony regarding Nichols' activities means Nichols could not have seen what he testified to seeing. Tan next contends that the significant impeachment of Nichols is fatal to the Board's credibility findings. Specifically, Tan asserts that Nichols testified falsely that he witnessed Tan take a price tag from a lower-priced item and place it on the merchandise depicted in City's Exhibit 5, because City's Exhibit 5 was an item that rang up at the

correct price. Tan argues, relying on *Basketfield v. Police Board of the City of Chicago*, 56 Ill. 2d 351, 359 (1974), that the decision is against the manifest weight of the evidence because the Board failed to discredit the testimony of Nichols, an impeached witness. He also asserts that the Board erred in failing to apply a negative inference to the Police Department's intentional destruction of evidence in this case. Additionally, Tan argues that separation is not the appropriate penalty based on his record of never having been disciplined during his career as a Chicago police officer, his exemplary work history, and the minimal \$86 value alleged to have been stolen.

The Board's Guilty Findings are Supported by the Evidence

The finding of a violation of the law at issue here, retail theft, requires proof by the preponderance of the evidence that Tan knowingly:

- altered, transferred or removed a price tag affixed to any merchandise offered for sale in a retail mercantile establishment;
- attempted to purchase such merchandise at less than the full retail value;
- with the intention of depriving the merchant of the full retail value of such merchandise.

See 720 ILCS 5/16-25 (a)(2). For purposes of retail theft, "full retail value" is "the merchant's stated or advertised price of the merchandise." 720 ILCS 5/16-0.1. Intent may be inferred from the nature of Tan's actions and the circumstances accompanying the criminal conduct. See *People v. Perez*, 189 Ill. 2d 254, 266 (2000). Thus, evidence that Tan removed a sticker is insufficient. There must also be evidence of Tan's attempt to purchase at less than the full retail value and Tan's intent to deprive the merchant of the full retail value.

Credibility is at the heart of this case. The Board chose to believe the testimony of Nichols, finding him credible, and to disbelieve Tan's denials. Review of the record shows that the Board's credibility findings are supported by the evidence.

Significantly, there is no evidence that the Board incorrectly characterized Nichols and Carrion as disinterested witnesses. They had nothing to gain by testifying against Tan. Both Nichols and Carrion had the opportunity to observe many of Tan's actions at Micro Center. Neither of them observed Tan's every move, but their testimony could be found more credible because of their admissions of occasionally losing sight of Tan.

Tan argues that the only way properly to conclude that he removed price tags from lower-priced items and placed them on higher-priced items is to believe the entire testimony of Nichols and discount the testimony of Carrion. He contends that if Carrion is believed, then Nichols could not have seen what he testified to seeing, so for the decision to be consistent with the evidence the Board must have concluded that Carrion's testimony was not credible. Yet the Board found Carrion's testimony convincing.

Certainly there were discrepancies between Nichols' and Carrion's testimony, but they were minor. Carrion's testimony about her surveillance, and her observations of Nichols' surveillance, does not show that the two accounts are so different in important respects as to undermine Nichols' crucial testimony about Tan removing stickers and placing stickers on other merchandise. In other words, the discrepancies are not enough to conclude that Nichols' observations were wrong. The Board's finding

that it "specifically believes the testimony of Mr. Nichols and Ms. Carrion that Officer Tan switched the stickers on [City's] Exhibit Nos. 3 and 6" suggests that Carrion observed Tan switching stickers, which she did not. However, the phrasing may reflect the earlier finding of corroboration, or may simply be inaccurate. In either case the Board's weighing of the evidence is unaffected. Discrepancies between Nichols' and Carrion's testimony do not amount to significant impeachment of Nichols.

Tan also argues that Nichols was significantly impeached with regard to City's Exhibit 5. In considering the impeachment of Nichols, the court must review the evidence in the light most favorable to the Board. *See Sangirardi v. Village of Stickney* 342 Ill. App. 3d 1, 16 (1st Dist. 2003). However, sufficient impeachment warrants preemption of an agency's assessment of credibility. *See Lo Piccolo v. Department of Registration & Education*, 5 Ill. App. 3d 1077, 1082-83 (1st Dist. 1972) (dicta). The record shows that the impeachment of Nichols did not rise to that level.

Nichols testified that he witnessed Tan remove a price tag from a lower-priced item and place it on merchandise depicted in City's Exhibit 5. This testimony, which Tan characterizes as false, is incorrect because the price tag on the Xtreme N Antenna was proper and the item was legally purchased. Tan argues, "[t]he Board can't have it both ways. It can't cite to [Nichols'] credible testimony and ignore his false testimony. His testimony should have been disregarded based upon this fact alone." Reply Brief, p. 3.

The evidence supports the Board's express finding that Nichols' testimony was credible, and its implicit finding that Nichols' testimony was not rendered untrue or

unreliable due to Nichols' impeachment with regard to City's Exhibit 5. In these proceedings the Board expressly acknowledges that impeachment. According to the Board during oral argument, Nichols was impeached on one occasion, and "no one's perfect." Although the Board's admission sounds cavalier, the Board correctly implies that all impeachments should not receive the same weight.

The record reflects Nichols' unimpeached testimony about two items that rang up at a lower price. His testimony is corroborated by the stickers on the items. Although Nichols' description of the stickers and of the manner in which Tan removed them was somewhat confusing, Nichols was clear that the stickers can be removed without disintegrating, and he testified that Tan spent several minutes accomplishing the removals. He saw Tan put a tag on the adapter and on the blu-rays. The record, in particular the transcript of the closing arguments, reflects that the Hearing Officer carefully considered what weight to give Nichols' testimony in light of the impeachment. The Board viewed the video-recording of Nichols' testimony and conferred with the Hearing Officer on the credibility of the witnesses. (Decision, pp. 1, 6).

The impeachment was not so significant that it undermined all of Nichols' testimony. In other words, the impeachment was not such that the Board could only conclude that Nichols testified falsely in whole. Rather, the Board could consider Nichols' focus on Tan, his ability to observe, his memory, his demeanor, and, again, the lack of evidence of any interest, bias, or prejudice and determine that he was a credible, disinterested witness. On that basis the Board could reasonably conclude that there was

no indication that Nichols knowingly and intentionally testified falsely; he may have been mistaken in part, or perhaps confused about one of the three items.

Thus, the impeachment of Nichols on one item of the three was significant, but not enough to overcome the evidence on the other two items or render that evidence false or improbable. The Board's credibility finding on Nichols is justified by the record.

Destruction of Evidence

The Board expressly recognized that the Police Department erred in destroying the "actual items stolen by Officer Tan." (Decision, p. 3). The issue is whether Tan was prejudiced by the use of photos of the stickers on the items without the items themselves.

The Hearing Officer considered the evidentiary issue, noted that the actual boxes would have been helpful, but ultimately concluded that the photographs were sufficient and the missing items did not prejudice Tan's ability to defend the case against him. Again, the Board viewed the video-recording, heard the Hearing Officer's oral report and conferred with him. (Decision, pp. 1, 6). The court is not convinced that the physical evidence would have further impeached Nichols. The record reflects that the Board did not need to view the actual boxes in order fully to assess and evaluate the credibility of Nichols, Carrion, and Tan. The Board reasonably concluded that Tan was not prejudiced by the destruction of the evidence and that Tan was not entitled to a negative inference that the physical evidence would have been favorable to Tan and would have further impeached Nichols.

"An administrative tribunal's finding of 'cause' for discharge commands our respect, and it is to be overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service." *Walsh v. Board of Fire and Police Commissioners*, 96 Ill. 2d 101, 105 (1983). The question is not whether the court would decide upon a more lenient sanction or conclude in view of the mitigating circumstances that a different penalty would be more appropriate. *Id.* at 106.

Here, Tan's theft was not significant when viewed in terms of dollars. However, employing an officer whom the Board found guilty of retail theft and making false statements denying the theft would tend to undermine public confidence in the honesty and integrity of the police force. The majority of the Board reasonably concluded that the nature of Tan's conduct warranted termination. The Board's decision to discharge Tan was not excessive, unduly harsh or unrelated to the needs of service. The findings of fact sufficiently support the Board's conclusion that cause for discharge exists.

IT IS HEREBY ORDERED:

The administrative decision of the City of Chicago Police Board to discharge Chicago police officer Roy Tan is affirmed.

Judge Kathleen G. Kennedy

ENTER:

MAR 12 2014

Circuit Court - 1718